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IN THE

Supreme Court of the United States

October Term, 1966

No. 565

BARBARA L. HIATT,
Petitioner,
v.
SAN FRANCISCO NATIONAL BANK, AND FEDERAL DEPOSIT INSURANCE CORPORATION as Receiver of SAN FRANCISCO NATIONAL BANK,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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WESTERN PRINTING COMPANY, WHITTIER—OXBOW 8-1722

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on April 29, 1966.

CITATIONS TO OPINIONS BELOW

The opinion of the district court is unreported (R. 24). The opinion of the Court of Appeals (R. 45), printed in Appendix A hereto, *infra*, page a-1, is reported at 361 F. 2d 504.

JURISDICTION

The judgment of the Court of Appeals was entered on April 29, 1966 (R. 50). An order dated July 5, 1966, extending the time for filing this petition to and including September 26, 1966, was granted by Mr. Justice Tom C. Clark. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

This is a suit for damages based upon a loan of money in violation of the federal usury statute, 12 U.S.C., §§85 and 86. Under §86 of the statute, a national bank that charges a usurious rate of interest incurs: forfeiture of the entire interest payable and, liability to the borrower for twice the amount of interest that has been paid. Under §85, a national bank may not charge more than the greater of: the rate of interest allowed by the laws of the state where the bank is located, or, one percent in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve Bank in the Federal reserve district where the bank is located, except that, if a different

rate of interest is limited for banks organized under the law of the state in which the national bank does business, then such rate of interest is the maximum rate a national bank may charge.

Section 85 also provides that when no rate of interest is fixed by the laws of the state involved, a national banking association may not charge interest at a rate exceeding the greater of either: seven per cent, or, one percent in excess of the discount rate on ninety-day commercial paper.

Article 20, §22 of the California Constitution provides that the maximum rate of interest that may be charged in the State of California is ten per cent (10%), but certain classes of lenders, including all banks, are categorically exempted from all restrictions upon interest rates they may charge, for all purposes. The respondent bank charged Petitioner interest at the rate of twenty-five and seven tenths per cent (25.7%) on a loan. The questions presented are:

(1) Is a rate of interest limited, or fixed, for state banks, within the meaning of 12 U.S.C. §85, by Article 20, §22 of the California Constitution, wherein it is provided that all state banks are exempt from all limitations on interest rates.

(2) Are the provisions of 12 U.S.C. §85 violated by a national bank doing business in California that loans money at an interest rate of twenty-five and seven

tenths per cent (25.7%), where the maximum rate of interest allowed by California law is fixed at ten per cent (10%).

(3) Where all banks are exempt under California law from all interest rate restrictions. is that a situation to which Congress intended that portion of 12 U.S.C. §85 apply, which reads, *inter alia,* "When no rate is fixed by the laws of the State . . ."

(4) What is the meaning of the phrase, "interest at the rate allowed by the laws of the State," as used in 12 U.S.C. §85.

STATUTES INVOLVED

The statutory provisions involved are 12 U.S.C. §§85 and 86. They are printed in Appendix B, *infra,* pp. b-1, b-2.

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved is Article 20, §22 of the Constitution of the State of California. It is printed in Appendix B, *infra,* pp. b-3 to b-5.

STATEMENT OF THE CASE

The facts of this case have been succinctly stated by the Court below, and its statement (R. 45-46) is here adopted:

> Appellant, plaintiff below, [Petitioner herein] appeals from the District Court's dismissal of her complaint. The action was based upon the claim that usurious interest had been charged and collected by the appellee,[1] San Francisco National Bank, a national banking association. It was begun in the California state court and removed to the District Court, where jurisdiction was grounded upon the provisions of sections 1346 and 1348 of Title 28, U,S.C. and section 1819 of Title 12, U.S.C.
>
> The appellant borrowed a sum of money from the appellee and, by agreement, paid a rate of interest amounting to 25.7 percent per year. * * *

[1]Appellee San Francisco National Bank is in receivership. Federal Deposit Insurance Corporation, its Receiver, was named as a defendant in plaintiff's Complaint and is also an appellee herein.

The Court of Appeals specifically stated in its opinion that banks which are created and operate under the laws of California are not governed in the

charging of interest rates, and therefore, they are subject to no restriction on interest rates or charges. (R.47.) The Court below asserted that upon considering the Federal statute in its entirety, it perceives a *congressional intent* that the competitive opportunities of a national bank operating in a certain state *should not be impeded by congressional limitations* on interest charges which are more restrictive than state limitations imposed upon the state's banks. (R.47).

Further, the Court below rejected Petitioner's arguments that California law fixed no allowable maximum interest rate with respect to state banks, and that a different rate of interest is not limited for state banks (in contrast to certain non-bank lenders), within the meaning of 12 U.S.C. §85.

Although the Court below conceded that Petitioner's contentions are "technically forceful" (R.47), it concluded that *Daggs v. Phoenix National Bank,* 177 U.S. 549 (1900) is dispositive of the instant case. The Arizona statute involved in *Daggs,* which allowed all lenders to charge unlimited interest rates, was identical to the California law of 1850, which allowed all lenders to charge unlimited interest rates. Statutes of California, 1850, Ch. 31, §2, p. 92. Appendix-B, p. b-5. *California repealed that statute almost fifty years ago.* Civil Code of California, §1916-4 (Statutes of California 1919, p. lxxxvii, §4).

The California Supreme Court, in *Carter v. Seaboard Finance Co.*, 33 C. 2d 564 (1949), a twenty page opinion, has clearly enunciated its interpretation of Article 20, §22 of the California Constitution, which governs interest rates in California. Consequently, this Court need not enter the thicket of state law, or decide a question of state law. The California Supreme Court has unequivocably already done so.

In *Carter*, the California Supreme Court, speaking of the Statute of 1850 (from which the Arizona unlimited interest rate statute presumably was copied) said, 33 Cal. 2d 564, at 575:

Thus, this state was without a general usury statute for the first 68 years of its existence. [Emphasis supplied.]

REASONS FOR GRANTING THE WRIT

The plain meaning of the plain words of an important Federal statute is the cardinal issue presented by this Petition. The construction placed upon it by the Court below assigns its paramount purposes to an inconspicuous burial in the legal graveyard of semantic nullification.

I.

AN IMPORTANT QUESTION OF INTERPRETATION OF A FEDERAL STATUTE IS INVOLVED.

(1) The decision of the Court below emasculates the plain meaning of 12 U.S.C. §§85 and 86, and the congressional intent in enactment thereof. Congress obviously intended to allow national banks to charge the rate of interest allowed under state law which specifically fixes and limits the rate of interest.[1] The maximum rate of interest allowed by California law is ten percent (10%). Article 20, §22, California Constitution. California law does not provide a different limited rate of interest for state banks. Therefore, that portion of 12 U.S.C. §85 which allows national banks to charge a rate of interest limited by state law for state banks, is inapplicable in the case at bar. Congress carefully provided that nationally chartered banks were subject to specific limits on the interest rates they could charge, if the state in which the national bank was located did not have a fixed interest rate limitation. This proposition is clearly established by the second sentence of 12 U.S.C. §85:

> . . . *When no rate is fixed by the laws of the State, Territory, or District,* the bank may take, receive, reserve, or charge a rate not exceeding 7 per centum, or 1 per centum in excess of the dis-

[1]If one per cent plus the discount rate on ninety-day commercial paper (hereinafter called the "Federal discount rate") in effect at the Federal reserve bank in the Federal reserve district where the bank is located, exceeds the amount allowed by state law, then the former rate can be charged by national banks.

> count rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and such interest may be taken in advance . . . [Emphasis supplied.]

The language of the statute reflects a clearly designed Congressional intent that the interest rates chargeable by nationally chartered banks be subjected to limitations of a specific, fixed amount. Congress obviously was willing to abide by the decisions of the State legislatures, where they had enacted specific rate limitations; but, where no interest rate limitation is fixed in a specific amount, by a state law, the Congressional mandate requires that a nationally chartered bank not charge a rate exceeding the greater of seven per cent or the Federal discount rate.

The decision of the Court below is not merely erroneous, it is egregiously so.

(2) The decision of the Court below completely nullifies 12 U.S.C. §86 in all situations where a state has not enacted a fixed interest rate limit which is specific in amount. That section provides that upon the violation by a nationally chartered bank of the interest rate limitations prescribed in 12 U.S.C. §85, the bank shall forfeit all of the interest provided for

in the note (or other evidence of debt) and it shall be liable for double damages with respect to all interest paid to it by the borrower.

Under the decision of the Court below, there can be no violation of the Federal usury statute, 12 U.S.C. §86, under any conceivable circumstances or facts, in the State of California. The decision of the Court below holds that a nationally chartered bank doing business in California can charge any rate of interest, without limitation. Consequently, under no circumstances can any loan transaction result in usury. If this Court upholds the decision of the Court below, then 12 U.S.C. §86 is mere surplusage.

The solicitous preoccupation of the Court below with the ostensible congressional intent of securing equality for nationally chartered banks with state banks is misplaced. That "intent" vanishes upon consideration of the fact that 12 U.S.C. §86 was enacted for the benefit of the victims, not the perpetrators, of usury. The sanctions there imposed upon usurious bank lenders indicate the plain congressional objective. Likewise, the second sentence of 12 U.S.C. §85 indicates that Congress was also deeply concerned that national banks not be without specific, fixed interest rate limitations, where the state in which it did business failed to fix such rates. Obviously, the "competition" argument of the Court below cannot bear analysis in light of the second sentence above-referred to.

Clearly, where a state has fixed no interest rate limitation, a state chartered bank can charge any rate of interest it pleases, but Congress has carefully articulated the fixed interest rate limits beyond which national banks dare not go.

Additional unmistakable evidence that Congress intended that the rate of interest allowed by the laws of a state must be a specific rate, which is fixed and limited, within the meaning of 12 U.S.C. §85, is supplied by the phrase which appears in the first sentence of §85, "whichever may be the greater, and no more," which obviously modifies the two preceding clauses, which read in pertinent part: "interest at the rate allowed by the laws of the State, or at a rate of one per centum in excess of the discount rate on ninety-day commercial paper * * * *whichever may be the greater, and no more* * * *" [Emphasis supplied.]

II.

THERE IS A DIRECT CONFLICT BETWEEN THE DECISIONS OF THE COURT BELOW AND THE SECOND CIRCUIT.

(1) There is a direct conflict between the decision of the Court below and *In Re Alfred Wild,* 29 Federal Cases 1211 (C.C.A. — 2d, 1873). *Wild* is the only case Petitioner has found that presents a state law governing interest rates which creates a legal situation that is virtually analogous to that created by Article 20, §22 of the California Constitution.

Wild has not been overruled, modified, distinguished or criticized (as is reflected in Shepard's Federal Reporter Citations). It has been ignored by both of the courts below, neither having cited nor discussed it in their opinions. *Wild* involved a damages suit for usury predicated upon violations of the statutory predecessor of 12 U.S.C., §§85 and 86, namely, 13 U.S. Stat. 108 (National Banking Act of 1864, section 30). The purport of section 30, National Banking Act of 1864, is identical, for all purposes here involved, with the extant Federal interest rate and usury statute.

In *Wild,* the plaintiff was a surety on a loan made to a New York corporation by a nationally chartered New York bank. The then applicable New York statutes provided that an interest rate in excess of seven per cent per annum on a loan of money was usurious, *except that no corporate borrower could interpose the*

defense of usury on any loan made to it. Rosa v. Butterfield, 33 N.Y. 665 (1865), a decision of the highest appellate court in New York, had previously decided that the New York legislature had repealed its usury laws (by making them inapplicable and precluding interposition of the defense of usury) with respect to money borrowed by corporations. Therefore, there was no fixed or limited interest rate applicable to such loans made in New York.

The Circuit Court of Appeals for the Second Circuit held that a loan made by any lender to a corporation was subject to no fixed or limited interest rate, and therefore, the legal effect of the exemption from state interest rate limitations on loans to corporations, invoked section 30 of the National Banking Act of 1864, which provides that, when no interest rate is fixed by the laws of the state, a national bank cannot charge a greater rate of interest than seven per cent. Consequently, the Court held that the questioned loan was usurious under section 30 of the National Banking Act of 1864, and awarded damages pursuant to the sanctions imposed under section 30, which penalties are identical with those of 12 U.S.C. §86.

Wild is at war, and irreconcilable, with the decision of the Court below, because both decisions involve a loan by a national bank:

(1) the interest rate on which is neither limited nor fixed by state law,

(2) which is subject to no state law whatsoever imposing restrictions upon or penalties with respect to usury, and

(3) as to which each of the applicable Federal interest rate statutes provides that if no state law fixes an interest rate limitation on loans, then seven percent (or the federal discount rate, if greater) shall be the maximum rate of interest a national bank may charge,

yet the Court below held that the federal statute relating to interest rates allows any rate of interest to be charged in such a case, although *Wild* held precisely to the contrary.

It is respectfully submitted that the Court below fell into a semantic trap by its determination that because state banks in California can charge any rate of interest they desire with impunity, national banks are entitled to an equally indiscriminate and unlimited power to gouge its borrowers. In the instant case, it is submitted that the Court below has accorded meanings to the terms "rate of interest", "fixed", "allowed", and "limited", which constitute serious deviations from the plain meaning rule and completely vitiate the Congressional intent.

The thrust of *Wild* is neither dulled nor affected by this Court's decision in *Daggs v. Phoenix National Bank*, 177 U.S. 549 (1900), for the reason that the

Arizona statute construed in *Daggs* is clearly distinguishable in purport, design, and language, from the New York statute at issue in *Wild*.

The Court below asserted that it felt obliged to decide the instant case as it did because of this Court's decision in *Daggs v. Phoenix National Bank*, 177 U.S. 549 (1900). In *Daggs*, this Court had before it the question of the meaning of an Arizona statute which provided that "parties may agree in writing for the payment of any rate of interest whatever. . . ." Revised Statutes of Arizona (1887), Title XXXVIII, 2161 (Sec. 1), 2162 (Sec. 2). It is of critical significance that this Court note that the Arizona statute at issue in *Daggs* was identical with the California "unlimited interest rate statute" in existence in 1850. Statutes of California - 1850, Ch. 31, p. 92, §§1-3. See Appendix p. b-5. It was repealed in 1919. See, Civil Code of California, §1916-4 (Statutes of California, 1919, p. lxxxvii, §4). The California constitutional amendment which gives rise to the case at bar is the outgrowth of numerous changes by the legislature and the people of California in the law of interest rates - the statute at issue in *Daggs*, a verbatim copy of §§1 and 2 of the 1850 California statute, cannot be controlling.

Petitioner stresses that there was no usury law in effect either in California or Arizona during the entire life of their "unlimited interest rate statutes". Of

course, no usury could be committed by any lender, because there were no fixed interest rate limitations under such statutes — truly, the sky was the limit.

The California Supreme Court has ruled on the meaning of Article 20, §22 (which is an amendment) of the California Constitution in a twenty page majority decision, in *Carter v. Seaboard Finance Co.*, 33 Cal. 2d 564 (1949). The Court specifically addressed itself in that decision to the fact that there is no regulation of or limitation upon the interest rates that may be charged by an exempted class of lenders, into which category all California banks fall.

The Court said, 33 Cal. 2d 564, at pages 581 and 582:

> The words which we have italicized are a clear and positive representation that the amendment [Article 20, §22] if adopted would not fix the interest rates and charges for the exempted classes and would vest in the Legislature the power to regulate the business of those classes including the power to fix such rates of interest and charges. * * *
>
> * * * *
>
> The foregoing history is a demonstration that it was the purpose of the constitutional amendment of 1934 to free the Legislature from the restraints imposed by inflexible usury provisions *so that interest and charges more appropriate to business conditions peculiar to each of the exempted classes could be established. Those who voted for the 1934 amendment had reason to expect that the*

> *exempt classes would not remain unregulated indefinitely.* But until the Legislature exercises the power granted to it by the amendment to regulate the business of lenders in a manner appropriate to each exempted class, the class not so governed by legislation is subject to no restriction on interest rates or charges. [Emphasis supplied.]

The California constitutional amendment has exempted banks from all interest rate limitations and usury penalties, and until the Legislature acts, there is no California law fixing or limiting the interest rate for banks. The Arizona statute involved in *Daggs* specifically stated that the parties are competent to agree in writing to any rate of interest whatever. Petitioner respectfully submits that *Daggs* was incorrectly decided, inasmuch as there was no maximum rate of interest fixed or limited by the Arizona statute. The Arizona statute in *Daggs* does not bear the faintest resemblance to the California constitutional amendment.

Yet, the Court below stated in its opinion (R.48-49):

> * * * The silence of California's legislature produces the same effect in California as that resulting in Arizona from the Arizona statute authorizing lenders and borrowers to 'agree in writing for the payment of any rate of interest whatever.' * * *
>
> No specific maximum rates were 'fixed' by the Arizona statute, but in true effect, the law in both Arizona and California has 'fixed' the rates for

state banks in the two jurisdictions as without limitation except such as may be established by agreements between the banks of the two states and those who borrow from them.

III.

THE DECISION OF THE COURT BELOW CONFLICTS WITH AND CONSTITUTES A REFUSAL TO FOLLOW A DECISION OF THE CALIFORNIA SUPREME COURT WHICH HOLDS THAT UNDER CALIFORNIA LAW THERE IS NO FIXED INTEREST RATE LIMITATION ON LOANS BY BANKS.

In *Carter v. Seaboard Finance Co.*, 33 Cal. 2d 564, at 582, the Court stated that the exempted class of lenders (including banks) is subject to no restrictions on interest rates under Article 20, §22 of the California Constitution. Yet the Court below construed the California law exempting banks from interest rates as having "'fixed' the rates for state banks" (R.49). It draws this conclusion from its analogy to the Arizona statute in *Daggs, supra,* which statute is identical to the California statute enacted in 1850 and repealed in 1919.

IV.

THE ISSUES PRESENTED ARE OF CURRENT AND CONTINUING IMPORTANCE TO MANY NATIONAL BANKS AND THEIR BORROWERS.

There are critical reasons of current importance that merit this Court's granting the writ. The Federal interest rate and usury statute has been a part of Federal law for more than one hundred years, and the questions here raised as to its application are of crucial legal and economic significance to California's more than eighteen million citizens and to its national banks, four of which rank among the fifty largest in the Union. As of June 30, 1966, the total assets of nationally chartered banks in California aggregated approximately twenty-nine billions of dollars, per the report of Arnold E. Larsen, Regional Administrator of National Banks. See San Francisco Chronicle, Friday, August 12, 1966, Page 57. The issues raised by this Petition, are purely those of law, the resolution of which by this Court, it is hoped, will prevent the unlimited gouging of California's citizens, at least by national banks.[2]

The amount involved in the case at bar is comparatively insignificant; however, there are numerous borrowers involved in litigation with the Respondent bank, while still others are attempting to negotiate

[2]In *Peoples Finance and Thrift Co. of Beverly Hills v. Mike-Ron Corp., Inc., et. al.*, 236 Cal. App. 2d 897 (D.C.A. - 4, 1965), the District Court of Appeal (Fourth District), in California, upheld an interest rate charge of 80.79 percent interest per annum on a loan made by an industrial loan licensee, a type of lender which also is classified as exempt under Article 20, §22 of the California Constitution.

settlements with the Respondent bank, the disposition of which cases presumably will be affected by the fate this one meets. Petitioner does not know but has reason to think that the amounts in the companion cases involve millions of dollars. Counsel for the Respondents undoubtedly can supply this Court with the total amount involved.[3] inasmuch as counsel and his law firm represent Respondent bank in all of its claims for unpaid loans.

The purposes of the Federal usury statute are to protect borrowers, and to discourage nationally chartered banks, from usury. The decision of the Court below simultaneously destroys both of those purposes.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

COLEMAN J. LESSER
Counsel for Petitioner.

September 16, 1966.

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[3]By a letter dated August 26, 1966, counsel for the Respondents declined to inform Petitioner's counsel of the total amount involved.

APPENDIX "A"

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Barbara L. Hiatt,	)	
Appellant,	)	
vs.	)	
	)	
San Francisco National Bank, Doe One, Doe Two, and Federal Deposit Insurance Corporation as Receiver of San Francisco National Bank,	)	No. 20,465
Appellees.	)	

[April 29, 1966]

On Appeal from the United States District Court
for the Northern District of California
Southern Division

Before: POPE, BARNES, and ELY, Circuit Judges

ELY, Circuit Judge:

Appellant, plaintiff below, appeals from the District Court's dismissal of her complaint. The action was based upon the claim that usurious interest had been charged and collected by the appellee,[1] San Francisco National Bank, a national banking association. It was begun in the California state court and re-

[1]Appellee San Francisco National Bank is in receivership. Federal Deposit Insurance Corporation, its Receiver, was named as a defendant in plaintiff's complaint and is also an appellee herein.

moved to the District Court, where jurisdiction was grounded upon the provisions of sections 1346 and 1348 of Title 28, U.S.C. and section 1819 of Title 12, U.S.C.

The appellant borrowed a sum of money from the appellee and, by agreement, paid a rate of interest amounting to 25.7 percent per year. The legality of the rate requires answer to the question succinctly put by appellant, "May a bank created and operating under and pursuant to the laws of the United States of America charge any rate of interest in California or is it limited by the provisions of 12 U.S.C. 85?"

In pertinent part, 12 U.S.C. § 85 provides,

> "Any association may . . . charge . . . interest at the rate allowed by the laws of the State, . . . where the bank is located, . . . and no more, except that where by the laws of any State a *different rate is limited for banks organized under State laws,* the rate so limited shall be allowed for associations organized or existing in any such State under this chapter. *When no rate is fixed by the laws of the State,* . . . the bank may take, receive, reserve, or charge a rate not exceeding 7 per centum . . ." (Emphasis added.)

Appellant urges that "no rate is fixed by the laws of the State" and that, hence, appellee was forbidden to collect an interest charge in excess of 10 percent per annum, the maximum chargeable rate permissible to most lenders under California law.

Before its repeal in 1918, section 1918 of the California Civil Code, enacted in 1872, provided that parties could agree in writing for the payment of any rate of interest whatsoever. The maximum interest rate was fixed at 12 percent annually by a California initiative measure approved on November 5, 1918. Cal. Civ. Code § 1916-1. Thereafter, on November 6, 1934, certain interest rate limitations were fixed in Section 22 of Article XX of California's constitution. The section fixed the interest rate generally chargeable at 7 percent per year and permitted an amount not exceeding 10 percent per year to be charged by written agreement; however, certain classes of lenders were exempt from the provision of the constitution. Among the exempt were banks "created and operating under and pursuant to any laws" of California or of the United States. The constitutional provision specifically empowered the California legislature to prescribe maximum rates which might be charged by the exempt classes of lenders, but, remarkably, the legislature has failed, with respect to banks, to exercise the authority which it received nearly thirty-two years ago. The neglect moved California's Supreme Court to observe, in 1949, "Those who voted for the 1934 amendment had reason to expect that the exempt classes would not remain unregulated indefinitely." *Carter v. Seaboard Finance Co.*, 33 Cal. 2d 564, 582, 203 P. 2d 758 (1949). And the court, stating the California rule as it yet remains, continued, "But until the Legislature exer-

cises the power granted to it by the amendment to regulate the business of lenders in a manner appropriate to each exempted class, the class not so governed by the legislation is subject to no restriction on interest rates or charges." 33 Cal. 2d at 582.

Banks which are created and which operate under the laws of California are not "governed by the [California] legislature" in the charging of interest; therefore, they are "subject to no restriction on interest rates or charges". Appellant interprets the last quoted language to mean that "no rate is fixed by the laws of the State" under the language of 12 U.S.C. § 85 and upon that interpretation bases her insistence that appellee charged an interest rate impermissibly excessive under the federal statute. She maintains that the section's language which appears to allow a national bank located in a particular state to charge as much interest as is chargeable by the state's banks under its local laws is inapplicable. She contends that since California law fixes no allowable maximum interest rate whatsoever with respect to its state banks, "a different rate is [not] limited for banks organized under State [California] laws" and the condition for the applicability of the provision is nonexistent.

Appellant's contentions are ingenious and techincally forceful. They also appeal to an equitable sense offended by oppressively exorbitant charges; nevertheless, we are convinced that they must be rejected. Con-

sidering the federal statute in its entirety, we clearly see a congressional intent that the competitive opportunities of a national bank operating in a certain state should not be impeded by congressional limitations on interest charges which are more restrictive than state limitations imposed upon the state's banks. This intent has twice been emphasized by the Supreme Court. As early as 1874, it was written,

> "The defendant [bank] is not to be subjected to a penalty [for usurious charges] unless the words of the statute precisely impose it.
>
> . . . .
>
> "It cannot be doubted, in view of the purpose of Congress in providing for the organization of National banking associations, that it was intended to give them a firm footing in the different States where they might be located. It was expected that they would come into competition with State banks, and it was intended to give them at least equal advantages in such competition. In order to accomplish this they were empowered to reserve interest at the same rates, *whatever those rates might be,* which were allowed to similar State institutions." (Emphasis added.)

Tiffany v. National Bank of Missouri, 18 Wall. (85 U.S.) 409, 410, 412, 21 L. Ed. 862 (1873).

In *Daggs v. Phoenix National Bank,* 177 U.S. 549, 20 S. Ct. 732, 44 L. Ed. 882 (1900), the Court wrote,

> "The meaning of these provisions [in the federal statute] is unmistakable. A national bank may charge interest at the rate *allowed* by the laws of the State or Territory where it is located; and equality is carefully secured with local banks." (Emphasis in original.)
>
> ". . . The intention of the national law is to adopt the state law, and permit to national banks what the state law allows to its citizens *and to the banks organized by it.*" (Emphasis added.)
> 177 U.S. at 555. (Citations omitted.)

We cannot avoid the plain direction of the foregoing expressions of the Supreme Court. In *Daggs,* the defendant national bank was located in Arizona, where the state law provided that "Parties may agree in writing for the payment of any rate of interest whatever. . . ." 177 U.S. at 554. There, as here, it was contended that the Arizona statute *fixed* no maximum *rate* of interest for Arizona state banks and that it followed that the national bank was prohibited from charging a rate in excess of the rate specified in the federal statute. The contention was rejected. The silence of California's legislature produces the same effect in California as that resulting in Arizona from the Arizona statute authorizing lenders and borrowers to "agree in writing for the payment of any rate of interest whatever". This being true, there is no distinction sufficient to justify a conclusion here which would oppose that reached by the Supreme Court in

its analysis of the federally prescribed permissions and restrictions as affected by the terms of the Arizona statute.

No specific maximum rates were "fixed" by the Arizona statute, but in true effect, the law in both Arizona and California has "fixed" the rates for state banks in the two jurisdictions as without limitation except such as may be established by agreements between the banks of the two states and those who borrow from them.

Our conclusion must necessarily be that the language of 12 U.S.C. § 85 which reads "Any association may . . . charge . . . interest at the rate allowed by the laws of the state . . . where the bank is located . . ." should be construed as meaning that a national association located in a particular state may charge as much interest as may be legally charged by the state's banks under the state's existing law.

Affirmed.

APPENDIX "B"

12 U.S.C. § 85:

"Rate of interest on loans, discounts and purchases

Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and no more, except that where by the laws of any State a different rate is limited for banks organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this chapter. When no rate is fixed by the laws of the State, or Territory, or District, the bank may take, receive, reserve, or charge a rate not exceeding 7 per centum, or 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run. The maximum amount of interest or discount to be charged at a branch of an

association located outside of the States of the United States and the District of Columbia shall be at the rate allowed by the laws of the country, territory, dependency, province, dominion, insular possession, or other political subdivision where the branch is located. And the purchase, discount, or sale of a bona fide bill of exchange, payable at another place than the place of such purchase, discount, or sale, at not more than the current rate of exchange for sight drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest."

12 U.S.C. § 86:

"Usurious interest; penalty for taking; limitations

The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same: *Provided,* That such action is commenced within two years from the time the usurious transaction occurred."

Cal. Const. art. XX, §22:

"Interest Rates

The rate of interest upon the loan or forbearance of any money, goods or things in action, or on accounts after demand or judgment rendered in any court of the State, shall be 7 percent per annum but it shall be competent for the parties to any loan or forbearance of any money, goods or things in action to contract in writing for a rate of interest not exceeding 10 percent per annum.

No person, association, copartnership or corporation shall by charging any fee, bonus, commission, discount or other compensation receive from a borrower more than 10 percent per annum upon any loan or forbearance of any money, goods or things in action.

However, none of the above restrictions shall apply to any building and loan association as defined in and which is operated under that certain act known as the 'Building and Loan Association Act,' approved May 5, 1931. as amended, or to any corporation incorporated in the manner prescribed in and operating under that certain act entitled 'An act defining industrial loan companies, providing for their incorporation, powers and supervision,' approved May 18, 1917, as amended, or any corporation incorporated in the manner prescribed in and operating under that certain act entitled 'An act defining credit unions,

providing for their incorporation, powers, management and supervision,' approved March 31, 1927, as amended or any duly licensed pawnbroker or personal property broker, or any bank as defined in and operating under that certain act known as the 'Bank Act,' approved March 1, 1909, as amended, or any bank created and operating under and pursuant to any laws of this State or of the United States of America or any nonprofit cooperative association organized under Chapter 4 of Division VI of the Agricultural Code in loaning or advancing money in connection with any activity mentioned in said title or any corporation, association, syndicate, joint stock company, or partnership engaged exclusively in the business of marketing agricultural, horticultural, viticultural, dairy, livestock, poultry and bee products on a cooperative nonprofit basis in loaning or advancing money to the members thereof or in connection with any such business or any corporation securing money or credit from any federal intermediate credit bank, organized and existing pursuant to the provisions of an act of Congress entitled 'Agricultural Credits Act of 1923,' as amended in loaning or advancing credit so secured, nor shall any such charge of any said exempted classes of persons be considered in any action or for any purpose as increasing or affecting or as connected with the rate of interest hereinbefore fixed. The Legislature may from time to time prescribe the maximum rate per annum of, or provide for the supervision, or the filing of a

schedule of, or in any manner fix, regulate or limit, the fees, bonus, commissions, discounts or other compensation which all or any of the said exempted classes of persons may charge or receive from a borrower in connection with any loan or forbearance of any money, goods or things in action.

The provisions of this section shall supersede all provisions of this Constitution and laws enacted thereunder in conflict therewith."

LAWS OF THE STATE OF CALIFORNIA

Chap. 31.

"AN ACT *to regulate the interest of Money.*

§ 1. When there is no express contract in writing fixing a different rate of interest, interest shall be allowed at the rate of ten per cent. per annum, for all moneys after they become due on any bond, bill, promisory note, or other instrument of writing, on any judgment, recovered before any Court in this State, for money lent, for money due on the settlement of accounts, from the day on which the balance is ascertained, and for money received to the use of another.

§ 2. Parties may agree in writing for the payment of any rate of interest whatever on money due, or to become due on any contract. Any judgment rendered on such contract shall conform thereto, and shall bear the interest agreed upon by the parties, and which shall be specified in the judgment.

§ 3. The parties may in any contract in writing, whereby any debt is secured to be paid, agree, that if the interest on such debt is not punctually paid it shall become a part of the principal, and thereafter bear the same rate of interest as the principal debt."

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1966

No. 565

BARBARA L. HIATT,
Petitioner,

vs.

SAN FRANCISCO NATIONAL BANK, and FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver of San Francisco National Bank,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

QUESTION PRESENTED

We believe that the question presented can best be stated as follows: *Whether interest exceeding 10 per cent is allowed by California law to banks and therefore is permitted by 12 U.S.C. § 85.*

STATEMENT OF THE CASE

Because we think petitioner's statement of the case is defective in several respects, we respectfully submit our own statement, as follows.

The federal usury law, which is contained in 12 U.S.C. § 85, provides:

> "Any association (i.e. national banking association) may . . . charge . . . interest at the rate allowed by the laws of the State . . . where the bank is located . . . and no more, except that where by the laws of any State a different rate is limited for banks organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this chapter. When no rate is fixed by the laws of the State . . . the bank may . . . charge a rate not exceeding 7 per centum . . ."[1]

The relevant California law is contained in Sec. 22 of Article XX of the constitution, which was adopted in 1934 and which provides:

> "The rate of interest upon the loan . . . of any money . . . shall be 7 percent per annum but it shall be competent for the parties to any loan . . . to contract in writing for a rate of interest not exceeding 10 percent per annum.
>
> No person . . . shall by charging any fee, bonus, commission, discount or other compensation receive from a borrower more than 10 percent per annum upon any loan . . .

---

[1]Section 86 of the statute provides for forfeiture of interest exceeding the rate allowed by Sec. 85 and for recovery of twice the amount thus paid.

However, none of the above restrictions shall apply to . . . *any bank created and operating under and pursuant to any laws of this State or of the United States of America* . . .

* * * * * * *

The Legislature[2] may from time to time prescribe the maximum rate per annum of . . . the fees, bonus, commissions, discounts or other compensation which all or any of the said exempted classes of persons may charge or receive from a borrower in connection with any loan . . .

The provisions of this section shall supersede all provisions of this Constitution and laws enacted thereunder in conflict therewith." (Emphasis supplied.)

The District Court in the case at bar, acting through Judge William T. Sweigert, held that the interest rate here involved did not violate the federal usury law, the reason being that since the California law exempted certain specified organizations, including banks, state and national, from all restrictions on interest, the rate here involved was "allowed by the laws of the State."

And the Court of Appeals affirmed on the same ground, saying:

"Our conclusion must necessarily be that the language of 12 U.S.C. § 85 which reads 'Any association may . . . charge . . . interest at the

[2]Since the California legislature has not acted on this subject with respect to banks, the law in that regard remains as stated in the constitution, and banks are subject to no restriction on interest rates. *Carter v. Seaboard Finance Co.*, 33 Cal.2d 564, 203 P.2d 758 (1949).

> rate allowed by the laws of the state . . . where the bank is located . . .' should be construed as meaning that a national association located in a particular state may charge as much interest as may be legally charged by the state's banks under the state's existing law." (Transcript of Record, page 49.)

Petitioner argues against this. She contends, contrary to the clear language of the statute, that Congress intended to allow national banks to charge the rate of interest allowed by the laws of the state *only* when the state law "specifically fixes and limits" a rate of interest.[3] As a consequence, according to petitioner, national banks are restricted to the 10% maximum fixed rate allowed under California law for lenders generally although state banks are *allowed* to charge any rate of interest by virtue of their exemption.[4]

If petitioner's contention were to prevail, the result would be that while state banks in California may charge any rate of interest, national banks would be limited to the 10 per cent which persons other than state banks may charge. In other words, petitioner is attributing to Congress the intention to place national banks at a disadvantage compared with state banks in this respect. We respectfully submit that this is an erroneous interpretation of the statute, and that the Courts below were correct in holding the contrary.

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[3]Petition, pp. 8, 9.

[4]Petition, pp. 8, 9; Question No. 2, pp. 3, 4.

ARGUMENT

I

PURPOSE OF THE FEDERAL STATUTE, AND RULE OF CONSTRUCTION

In construing this statute, this Court in *Tiffany v. Bank of Missouri,* 85 U.S. (18 Wall.) 409, 410 (1874), said:

> "In an action like the present, brought to recover that which is substantially a statutory penalty, the statute must receive a strict, that is, a literal construction. The defendant is not to be subjected to a penalty unless the words of the statute plainly impose it."

The Court in *Tiffany* also spoke of the purpose of the statute. In that respect, it said, at page 412:

> "It cannot be doubted, in view of the purpose of Congress in providing for the organization of national banking associations, that it was intended to give them a firm footing in the different states where they might be located. It was expected they would come into competition with state banks, and it was intended to give them at least equal advantages in such competition. In order to accomplish this they were empowered to reserve interest at the same rates, whatever those rates might be, which were allowed to similar state institutions. This was considered indispensable to protect them against possible unfriendly state legislation. Obviously, if state statutes should allow to their banks of issue a rate of interest greater than the ordinary rate allowed to natural persons, national banking associations could not compete with them, unless allowed the same."

II

THE STATUTE SHOULD BE CONSTRUED AS PERMITTING THE INTEREST CHARGED IN THIS CASE

The California law provides in effect that both state and national banks may charge any rate of interest. It does this by setting a maximum rate of 10 per cent for persons generally and then providing that certain enumerated organizations, including state and national banks, are exempt from that restriction. Thus the California law "allows" a national bank to charge any rate. And the federal usury statute provides that a national bank may charge interest "at the rate allowed by the laws of the State . . .". The conclusion is that the federal usury law does not subject national banks to a restriction of interest in California.

III

PETITIONER'S ARGUMENTS

Petitioner presents her arguments under four headings, which we now consider.

A. Interpretation of a Federal Statute

Petitioner argues that by the usury statute Congress intended that the interest rates chargeable by national banks be subjected to limitations of "a specific, fixed amount."

The statute does not evince any such limitation of intent. It says "at the rate allowed by the laws of the state." And, as this Court held in *Tiffany,* the

purpose is to put national banks on an equal footing with state banks.

Besides, petitioner's contention is disposed of by the decision in *Daggs v. Phoenix National Bank,* 177 U.S. 549, 554, 555 (1900). That case involved an Arizona statute which provided that the parties may agree to any rate of interest. This Court said:

> "The contention of appellant is that the rate of interest is not *fixed* by the laws of the territory. It permits the parties to do so, but does not do so itself. In other words, it is urged that the rate is fixed by permission of the laws, and not by the laws, and upon this distinction a power which every person and every bank in the territory has, it is contended, the national banks do not have.
>
> We cannot accept this as a correct interpretation of either the spirit or the words of the national banking act. By that act, certainly no discrimination was intended against national banks, and that the interpretation contended for would seriously embarrass their business is manifest." (Emphasis the Court's.)

After quoting from *Tiffany* to the effect that Congress did not intend to expose national banks to unfair treatment by the states, the Court in *Daggs* quoted the federal statute, and then said, at page 555:

> "The meaning of these provisions is unmistakable. A national bank may charge interest at the rate *allowed* by the laws of the state or territory where it is located; and equality is carefully secured with local banks.

> The clear meaning and purpose of these provisions remove the ambiguity of those which follow, if there is any ambiguity. 'When no rate is *fixed* by the laws of the state or territory or district, the bank may take, receive, or charge a rate not exceeding 7 per centum.' '*Fixed by the laws*' must be construed to mean '*allowed by the laws,*' not a rate expressed in the laws. In instances it might be that, but not necessarily. The intention of national law is to adopt the state law, and permit to national banks what the state law allows to its citizens and to the banks organized by it. *Tiffany v. National Bank,* 18 Wall. 409, 21 L.ed. 862." (Emphasis the Court's.)

Petitioner argues that § 86 (the remedial section) was enacted for the victims, not the perpetrators, of usury, and that the decision in the case at bar renders § 86 "mere surplusage." This is erroneous. § 86 remains effective in all cases in which § 85 is violated. The issue here is § 85, not § 86.

Petitioner refers to the fact that § 85 contains alternative provisions. The section says that a bank may charge interest "at the rate allowed by the laws of the State . . . *or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located,* whichever may be the greater, and no more . . .". Petitioner refers to the part which we have italicized and says that the necessity of a specific rate is confirmed by that part. We respectfully disagree. The alternative provision could be applicable in cases where the state law would set a specific maximum rate which would be

applicable to banks; it is simply irrelevant where the state law prescribes no limit. It is significant that the point is not even mentioned in *Daggs*.

B. Petitioner's Contention of Conflict Between Circuits

Petitioner argues that there is a conflict with the decision of the second circuit in the year 1873 in *In re Wild*, 29 Fed.Cas. 1211. That case involved a New York statute which provided that a corporation could not assert the defense of usury. The Court said that the effect of that was that there was no law in New York fixing the rate of interest on loans to a corporation and accordingly it applied the 7 per cent limitation contained in the federal statute.

Whether the situation in *Wild* is identifiable in legal effect with that in the present case is a question, but even if it were deemed to be so, we think that the conclusions of the Circuit Court in *Wild* are superseded by those of this Court in the *Daggs* case, and therefore, the status of *Wild* as a precedent has long since been removed.

Petitioner says that the *Wild* case has not been criticized. This is erroneous. In *Penrose v. Canton National Bank*, 147 Maryland 200, 127 Atl. 852 (1925), the statute involved was like that in the *Wild* case. It provided,

> "No corporation shall hereafter interpose the defense of usury in any action at law or in equity."

In dealing with this subject, the Court in the *Penrose* case said (127 Atl. at page 856):

"We have found little authority directly on the question of the applicability of this statute to loans by national banks. In two cases, In re Wild, Fed. Cas. No. 17,645, 11 Blatchf. 243, and Bramhall v. Atlantic National Bank, 36 N.J. Law, 243; 248, it was held that the abolition of the defense on a corporation note did not relieve a national bank from forfeiture of interest, or the penalty, for exceeding the limit of 7 per cent. specified in the federal law. Those courts considered the legal situation to be as if the state laws had omitted to fix any rate for such loans within the meaning of the federal law, so that the 7 per cent. limit specified in the latter law for states in which the laws have not fixed a rate would apply. But it seems to us that in view of the fact that the obvious purpose of the state statute is to leave lenders and corporate borrowers free to agree upon any rate of interest above the regular limit, the construction of the case of In re Wild and Atlantic Nat. Bank, supra, is inconsistent with the purpose of the federal law, declared in many decisions of the Supreme Court (Tiffany v. Nat. Bank of Missouri, 18 Wall. 409, 21 L. Ed. 862), *to put national banks in a position of equality with state institutions for dealing in loans.* Following out that purpose, it has generally been held *in later cases* that in those states in which statutes permit parties to loans to agree upon interest beyond the regular limits, *national banks must be held permitted to do the same thing.* (Citations)" (Emphasis added.)

Petitioner says that the *Wild* decision is not affected by the *Daggs* because the New York statute is distinguishable from the Arizona statute. On the contrary,

on a loan to a corporation, the laws of the two states were in effect the same, that is, the parties could contract freely as to interest. Moreover, the effectiveness of the *Daggs* decision in the case at bar is impliedly recognized by petitioner herein, who says that "*Daggs* was incorrectly decided." We believe, on the contrary, that the reasoning of the Court in the *Daggs* case was reasonable and correct and logically carries out the rule of construction and policy expressed in the *Tiffany* case.

Petitioner points out that the California law adopted in 1850 was the same as the Arizona statute (providing that parties could agree on any rate) but that the California law was repealed in 1919, and the California constitutional amendment of 1934 now governs. If this is an effort to escape the effect of *Daggs,* it is ineffective, because the Arizona statute and the California constitution amount to the same thing, namely that parties are free to agree on a rate of interest.

C. Petitioner's Contention That the Decision Herein Conflicts With a Decision of the California Supreme Court

The California Supreme Court in *Carter v. Seaboard Finance Co.,* 33 Cal.2d 564, 203 P.2d 758 (1949), said that until the legislature exercises the power granted to it by the constitutional amendment to regulate the business of lenders in a manner appropriate to each exempted class, the class not so governed by legislation is subject to no restriction on interest rates. Petitioner states that nevertheless the Court below in the present case construed the California law exempt-

ing banks from interest rates as having "fixed" the rates for state banks.

There is no conflict whatsoever with the California decision in the *Carter* case. In calling exemption from an interest rate a "fixing" of a rate, the Court here, as in *Daggs,* was construing a *federal* statute.

D. Petitioner's Charges Against National Banks

Petitioner's counsel closes his argument by making charges against national banks which are based upon assumptions, for which he goes outside the record.

He says that the assets of national banks in California amount to 29 billions of dollars, and that he hopes that the action of this Court will prevent "the unlimited gouging of California citizens, at least by national banks."

Of the bank here in receivership, he says there are numerous borrowers who are in litigation with the bank and "presumably" the disposition of their cases will be affected by the decision in this case; that he "does not know but has reason to think" that these cases involve millions of dollars; that undoubtedly we could supply the Court with the total amount involved but that we declined to inform petitioner's counsel thereof. Our reason for declining to furnish the requested information was that the subject matter thereof lies outside the record in this case; and for that reason, we respectfully submit that it has no place in the argument of the petition.

CONCLUSION

The interest charged in this case was allowable by local law. Therefore, it is permitted by the federal usury statute.

We respectfully submit, therefore, that the petition should be denied.

Dated, San Francisco, California,
October 14, 1966.

Respectfully submitted,
ROY A. BRONSON,
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FILED
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IN THE

Supreme Court of the United States

October Term, 1966

No. 565

BARBARA L. HIATT,

Petitioner,

vs.

SAN FRANCISCO NATIONAL BANK, and FEDERAL DEPOSIT INSURANCE CORPORATION as Recevier of SAN FRANCISCO NATIONAL BANK,

Respondents.

REPLY OF PETITIONER TO BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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WESTERN PRINTING COMPANY, WHITTIER—OXBOW 8-1722

IN THE

Supreme Court of the United States

October Term, 1966

No. 565

BARBARA L. HIATT,

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SAN FRANCISCO NATIONAL BANK, and FEDERAL DEPOSIT INSURANCE CORPORATION as Recevier of SAN FRANCISCO NATIONAL BANK,

Respondents.

REPLY OF PETITIONER TO BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

It ill befits Respondents' counsel to argue that Petitioner's counsel has made charges against national banks . . ."based upon assumptions, for which he goes outside the record." (Resp. Br., p. 12.) Respondents have declined to disclose the amounts involved in cases related to the one at bar; though such information is concededly not a part of the record, it is highly pertinent to this Court's determination as to whether this case presents a matter of public importance. To assist

this Court in its determination, Petitioner's counsel has obtained a copy of a letter, dated June 24, 1966, addressed to the creditors and stockholders of San Francisco National Bank, and signed by Melville B. Bennett, Liquidator, for the Federal Deposit Insurance Corporation, as Receiver of San Francisco National Bank.

The last paragraph on page 3 of that letter states:

> In this connection, the Receiver is involved in a large volume of litigation. As noted above, there are approximately 107 proceedings now pending against the bank's debtors for collection of loans. There are also numerous cases brought by creditors seeking priority over other creditors in distributions from the bank's estate; these are discussed below. In addition, causes of action have been asserted against the Receiver alleging that the bank engaged in fraudulent or illegal transactions in its dealings with its borrowers, depositors and others. *There are approximately 20 suits, defenses and counterclaims making these charges, involving millions of dollars.* Some borrowers make these charges to avoid liability on their notes, while other cases seek dollar damages from the estate of the bank. *These charges primarily concern sales of the bank's stock, alleged fraudulent misrepresentation made by the bank's management, and usury in connection with interest and loan fees. The U.S. Court of Appeals recently held for the Receiver that the usury allegations were not valid, and that decision will have a very*

favorable effect on the Receiver's defenses to these many charges. (Emphasis supplied.)

Respondents struggle admirably but in vain, with the naked conflict between *In re Wild,* 29 Fed. Cas. 1211, and the case at bar. First, they avoid arguing that there is no conflict, but recognize that there is a question. (Resp. Br., p. 9) Then, Respondents urge that *Wild* has no status as precedent since 1900, because of this Court's decision in *Daggs v. Phoenix National Bank,* 177 U.S. 549 (1900). But *Daggs* did not cite or discuss *Wild;* nor can *Daggs* be tortured into overruling *Wild.* Finally, Respondents devote a full page to citing and quoting *Penrose v. Canton National Bank,* 147 Maryland 200, 127 Atl. 852 (1925), a *state court decision.* (Resp. Br., pp. 9-10.) Respondents are driven to rely on a *state court decision* decided twenty-five years after *Daggs,* as their only authority in derogation of *Wild.*

Brevity being of cardinal importance in this reply, Petitioner abstains from refuting the many, important non sequiturs and fallacies replete throughout Respondents' brief, save but a few. Exemplary of Respondents' mistaken notions are the following. In ostensible refutation of one of Petitioner's arguments concerning interpretation of 12 U.S.C. §85, Respondents quote a portion of §85 (Resp. Br., p. 8), and attribute significance to the absence of discussion of the point in this Court's decision in *Daggs.* (Resp. Br., p. 9.)

Daggs was decided in 1900 by this Court; how could this Court have discussed the quoted portion of 12 U.S.C. §85, which was not enacted by the Congress until June 16, 1933?

Respondents assert that California law "allows" a national bank to charge any rate of interest. (Resp. Br., p. 6) Neither of the courts below enlisted this argument in their opinions. Clearly, Congress has preempted the field of interest rate limitations on national bank loans for more than one hundred years, and a state law cannot tell a national bank what rates it can charge.

Pervasive throughout Respondents' brief is voiced concern that national banks will be severely disadvantaged if this Court decides that 12 U.S.C. §85 forbids such banks to charge interest rates exceeding the greater of either 10% (the rate allowed by California law), or, 7% with interest in advance (pursuant to 12 U.S.C. §85). This apprehension is misguided because:

1) The *Wild* decision of the Second Circuit has been in effect for ninety-three years, yet national banks in New York thrive unhampered, and

2) The discount rate of 7%, in 12 U.S.C. §85, is a compound interest rate — stated in terms of simple interest, the rate allowed by 12 U.S.C. §85 is 13.61%.

Only by a decision of this Court can the patent conflict between the Second and Ninth Circuits on the issues stated be resolved.

Respectfully Submitted,

COLEMAN J. LESSER

Attorney for Petitioner.

October 21, 1966.

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IN THE

Supreme Court of the United States

October Term, 1966

No. 565

BARBARA L. HIATT,

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vs.

SAN FRANCISCO NATIONAL BANK, AND FEDERAL DEPOSIT INSURANCE CORPORATION as Receiver of SAN FRANCISCO NATIONAL BANK,

Respondents.

PETITION FOR REHEARING OF DENIAL OF PETITION FOR WRIT OF CERTIORARI OR REMAND, TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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WESTERN PRINTING COMPANY, WHITTIER—OXBOW 8-1722

IN THE

Supreme Court of the United States

October Term, 1966

No. 565

BARBARA L. HIATT,

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SAN FRANCISCO NATIONAL BANK, AND FEDERAL DEPOSIT INSURANCE CORPORATION as Receiver of SAN FRANCISCO NATIONAL BANK,

Respondents.

PETITION FOR REHEARING OF DENIAL OF PETITION FOR WRIT OF CERTIORARI, OR REMAND, TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Petitioner prays that this Court grant a rehearing of its Order of November 14, 1966, denying the Petition for Writ of Certiorari, and that in the alternative, either a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit in the above-entitled case as prayed for in the Petition filed Semptember 17, 1966, or, the case be remanded for further consideration by the Court of Appeals.

REASONS FOR GRANTING REHEARING OR REMANDING THE CASE TO THE COURT BELOW.

1. There is an unresolved ambiguity of fundamental importance in R.S. §5197, 12 U.S.C. §85, which the Court below failed to perceive, but by its decision, resolved, plainly contrary to the legislative history. 12 U.S.C. §85 reads, *inter alia*, "Any [national banking] association may . . . charge . . . interest at the rate allowed by the laws of the State. . . ." The Court below interpreted the term "allowed" to mean "permitted without limit," in the case at bar. This interpretation of the term "allowed" was made by the Court below without reference or citation to legislative history, and it is diametrically opposed to the meaning Congress intended, for the reasons which follow.

All states historically had, and currently have, two rates of interest: the "established (or legal) rate of interest," and the "allowed (or contract) rate of interest." See 3 CCH Federal Banking Law Reporter, §59,005, pages 37,071-37,079 (1966). The "legal or established rate of interest" is the maximum rate of interest that may be charged in the absence of an agreement to the contrary by the parties. The "allowed or contract rate of interest" is the maximum rate of interest that the parties may agree to under the laws of a state. This is indisputably established by the laws of each state and by the following legislative history.

The National Currency Act of 1863, Section 46, forbade national banks to charge a rate of interest exceeding the *established rate of interest* (of each state), and if a national bank did so, the penalty was *forfeiture of the entire debt.*

The National Bank Act of 1864 repealed the 1863 Act, and very extensive congressional debate preceded the enactment of the 1864 Act. None of the debates and proceedings in either house of the Congress, nor any other legislative history, has ever been cited or quoted by this Court, the Court below, or any other federal court in determining the meaning of the term "allowed" as used in Section 30 (R.S. §5197) of the National Banking Act of 1864. This statement is categorically true with respect to the two leading decisions on R.S. §5197, *Tiffany v. Bank of Missouri,* 18 Wall. 409, and *Daggs v. Phoenix National Bank,* 177 U.S. 549.

This Court has held that it is proper to go back to the law as originally enacted to ascertain the Congressional intent. *Nye v. United States,* 313 U.S. 33; *Williams v. United States,* 327 U.S. 711. More importantly, this Court has held that a long continued construction of a statute will not be followed when further research demonstrates that construction to be erroneous. *Erie Railroad Co. v. Tompkins,* 304 U.S. 64. This is precisely the situation presented by the case at bar.

The following excerpts from debate on the floor of the Senate clearly reveal the Congressional intent in enactment of Section 30 (relating to interest rate limits and usury) of the National Banking Act. All quotations are from *The Congressional Globe,* May 5, 1864, pages 2125 and 2127:

> MR. GRIMES. * * * I apprehend that there is not a Senator who does not see that there is a very wide difference between the law of last winter, which authorized them to take the rate of interest "established" by the laws of the State, and this act which it is proposed to pass into law, allowing them to take the rate which may be "allowed" by the laws of the State, which runs up as high as ten per cent.
>
> * * *
>
> MR. SHERMAN. I look upon it that the word "established" and the word "allowed" have substantially the same legal signification. Senators may do as they please upon it, but I look on the two words as precisely the same.
>
> MR. FESSENDEN. I do not consider them the same, so far as Iowa is concerned, at any rate. I think as a general rule "established" and "allowed" are the same thing, but it seems that in the State of Iowa "established" and "allowed" do not mean the same thing.
>
> MR. TRUMBULL. Nor do they in my State.
> MR. FESSENDEN. Nor do they in the State of Illinois. That I did not understand when the words were put in. I do not know hovever that I object to it if other States are let alone.
>
> * * *
>
> MR. DOOLITTLE. There is in my judgment a very great diference between the word "allowed" and the

word "established," and I will illustrate the case by what I believe to be the present law of the State of Wisconsin * * *.

* * *

MR. FESSENDEN. I ask permission to make a suggestion. I wish to suggest that if this amendment could be made a little more definite there might perhaps be no objection to it. There may be and there are States where no particular rate of interest is fixed for banks, and this provision ought to provide for that case.

MR. HENDERSON. The Senator certainly did not understand what I said a few moments ago. I propose if this amendment be adopted to follow it by inserting the word "such" after "no," in the seventh line, so as to read, "when no such rate is fixed by the laws of the State or Territory the bank may take, receive, reserve or charge a rate not exceeding seven per cent.," and instead of "a rate not exceeding seven per cent." I would say "a rate not exceeding that allowed to be charged on a special contract to individuals."

The National Banking Act of 1864 was approved on June 3, 1864, less than one month after the above-quoted proceedings occurred on the floor of the Senate, and the interest rate limitations and usury provisions of that Act reflect the debate set forth above. The debates clearly establish that the Congress intended that national banks be limited in the interest rates they could charge, by not exceeding the "allowed" rate of interest (of each State). And, the term "allowed" as used in the phrase "rate of interest allowed by the laws of the State" was indisputably intended by the Congress to mean the *contract rate of interest fixed by State law.*

The "allowed (or contract) rate of interest" in California is ten per cent, pursuant to Article XX, Section 22, California Constitution. Yet, the Court below held the "allowed rate of interest" in California to be unlimited. Appendix, page a-7, petition for writ of certiorari; 361 F. 2d 504 at 507. Thus, the very foundation of the rationale of the opinion of the Court below crumbles in light of this analysis, and it is urged that the case be remanded so that the Court below may reconsider its decision in light of this controlling and heretofore ignored legislative history.

Additional proceedings upon the floor of the House and Senate are set forth in the Appendix, pages 1-a and 1-b. These debate excerpts, while merely a small portion of the extensive discussion of interest rate limitations, are exemplary of the sense of both Houses of the Congress.

2. In 1933, Congress significantly amended 12 U.S.C. §85 to indicate its plain intent that national banks could not charge interest rates greater than the interest rate limitations on loans therein set forth, and the congressional amendment added the words . . . "*whichever may be the greater,*[*and no more*]" . . . . (Emphasis supplied.) The Congress also inserted an alternative interest rate limitation based upon the discount rate of commercial paper, which is regulated by the Federal Reserve Bank. Conference Report, No. 254, H.R. 5661, Banking Act of 1933, Section 25, page 30 (June 12, 1933). Yet, the Court below completely

ignored the fact and significance of these 1933 amendments by the Congress, and instead, grounded its opinion solely upon two decisions of this Court handed down in 1874 and 1900. *Tiffany v. Bank of Missouri,* 18 Wall. 409; *Daggs v. Phoenix National Bank,* 177 U.S. 549.

Tiffany construed Section 46 of the National Currency Act of 1863, and *Daggs* construed Section 30 of the National Banking Act of 1964. The failure of the Court below to accord significance to the amendments made by the Congress in 1933 invites application by this Court of its supervisory powers under its Rule 19, or, a remand to the Court below for reconsideration of the case in light of the Congressional amendments made thirty-three years after the latest decision cited by the Court below as authority.

3. The issues at stake in this case are currently, and will continue to be, of cardinal importance to numerous national banks and their borrowers. The federal law controlling interest rates and liability for usury is in a state of confusion. State courts have concurrent jurisdiction with the federal courts to entertain usury suits under 12 U.S.C. §§85, 86, and the various States have decided the cases both ways, not because of unique facts, but due to confusion over the meaning of 12 U.S.C. §85. The only current treatise available to petitioner on banking law does not even attempt to reconcile the conflicting decisions. See, 7 *Michie on Banks and Banking,* §191 (1944 ed., with 1964 supplement.)

More than twenty-six States have provisions in their usury laws which remove all interest rate limitations on the rates of interest changeable by national banks to corporate borrowers. A decision of this Court is of critical importance to the construction of 12 U.S.C. §85, not only in the case at bar, but for purposes of a virtually identical situation in more than twenty-six other States.

CONCLUSION

For the reasons set forth above, it is respectfully urged that a rehearing be granted and that, upon such rehearing, the case either be remanded to the Court of Appeals for the Ninth Circuit for reconsideration of its decision, or a Writ of Certiorari issue to that Court.

Respectfully submitted,

COLEMAN J. LESSER
Counsel for Petitioner.

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

Respectfully submitted,

COLEMAN J. LESSER
Counsel for Petitioner.

APPENDIX

The following Congressional debate is from *The Congressional Globe,* 1864.

MR. HOOPER. * * * It is to prevent the national banks from making such loans that we limit the rate of interest, nor in any case to exceed the rate of seven per cent. per annum; and this rate was selected because it is the legal rate in the great commercial State of New York.

The banks authorized under this national law are restricted and controlled in regard to the amount of currency they can issue and the rate of interest on their loans. * * *

* * *

[April 6, 1864, page 450.]

MR. TRUMBULL. The law of Illinois is precisely like that of Iowa. Six per cent. is the legal rate of interest, but they may charge ten by special contract.

MR. SHERMAN. If the Senator wishes the word "established" before "rate," I am perfectly willing to put it in there.

[May 5, 1864, page 2125.]

* * *

MR. GRIMES: I was going to show the Senator that the law of last winter is not the law he proposes to enact now. That was "the established rate of interest" by the law of the State. What was the rate established? Six per cent. was the rate established by the laws of the State, but there was an exception which declared * * *. Now let me read to the Honorable Senator what he proposes: "Interest at the rate allowed," not "established" "at the rate allowed by the laws of the State." Ten per cent. was allowed

by the laws of the State, but ten per cent. was not the "established" law of the State. * * *

[May 5, 1864, page 2125.]

* * *

MR. TRUMBULL. I regret that the word "allowed" has been changed to the word "established." * * * My impression is that it would change the character of the law entirely to alter the word "allowed" to "established."

* * *

[May 5, 1864, page 2126.]